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IN THE COURT OF APPEALS OF INDIANA

EUGENE A. NOWAK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A03-0602-CR-75
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0008-CF-150

August 23, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Eugene A. Nowak appeals his sentence for felony murder.[1] Nowak raises one issue, which we restate as whether his sentence violated his Sixth Amendment rights as articulated in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied. We affirm.

The relevant facts follow. On August 17, 2000, the State charged Nowak with murder,[2] felony murder, and aiding robbery as a class A felony[3] for events that occurred on July 23, 2000. On November 16, 2000, the State also filed an information alleging that Nowak was an habitual offender. Nowak pleaded guilty to felony murder and being an habitual offender.

On May 25, 2001, Nowak was sentenced. The trial court found the following aggravators: (1) Nowak's criminal history; (2) the imposition of a reduced sentence or suspension of a portion of the sentence would depreciate the seriousness of the offense; (3) Nowak's probation revocations; (4) Nowak had failed to address serious drug and alcohol problems and never participated in substance abuse counseling; and (5) the vicious nature of the attack, which included leaving the victim bound and hidden in a corn field. The trial court found the following mitigators: (1) Nowak's introduction to alcohol at a young age by his father; (2) Nowak's admission of involvement in the

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[1] Ind. Code § 35-42-1-1 (1998) (subsequently amended by Pub. L. No. 17-2001, § 15 (eff. July 1, 2001)).

[2] Id.

[3] Ind. Code §§ 35-41-2-4 (2004); 35-42-5-1(2004).

offense soon after his arrest and cooperation with authorities; (3) the offense was likely the result of impulsivity; (4) Nowak's service in the U.S. Army; and (5) Nowak's expression of remorse to the victim's family. The trial court sentenced Nowak to the presumptive sentence of fifty-five years in the Indiana Department of Correction and enhanced the sentence by thirty years due to his status as an habitual offender.

On February 23, 2005, Nowak filed a petition to file a belated notice of appeal pursuant to Ind. Post-Conviction Rule 2, which the trial court granted. Nowak's belated notice of appeal was filed on November 1, 2005.

The issue on appeal is whether Nowak's sentence violated his Sixth Amendment rights as articulated in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied. Nowak argues that the aggravators, other than his criminal history, were improper under Blakely and that "[i]t stands to reason, that if some of the aggravating circumstances were improperly found, the weight given to the aggregate would be lessened" and he would have received less than the presumptive sentence. Appellant's Brief at 12-13.

The State argues that we should not review Nowak's claim because he was sentenced long before Blakely was decided and Blakely should not apply retroactively to Nowak's sentence. We note that there are conflicting decisions from this court on this issue. Compare Robbins v. State, 839 N.E.2d 1196 (Ind. Ct. App. 2005) (holding that Blakely would not apply retroactively to the defendant's belated appeal), and Hull v. State, 839 N.E.2d 1250 (Ind. Ct. App. 2005) (holding that Blakely would not apply

retroactively to the defendant's belated appeal), with Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006) (holding that Blakely would apply retroactively to the defendant's belated appeal), trans. pending, and Perry v. State, 845 N.E.2d 1093 (Ind. Ct. App. 2006) (applying Blakely retroactively to the defendant's belated appeal), trans. denied. However, we need not address the State's argument because, even if Blakely applied retroactively to Nowak's belated appeal, Nowak's sentence would not be affected.

On June 24, 2004, the United States Supreme Court decided Blakely, which held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. Blakely, 542 U.S. at 303-304, 124 S. Ct. at 2537; Cotto v. State, 829 N.E.2d 520, 527 n.2 (Ind. 2005). In Smylie v. State, the Indiana Supreme Court held that Blakely was applicable to Indiana's sentencing scheme and required that "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005). Thus, when a trial court added years beyond the presumptive term, the aggravating circumstances identified for that enhancement were required to be either proven beyond a reasonable doubt, admitted by the defendant, or represent prior criminal convictions. Wright v. State, 829 N.E.2d 928, 930 (Ind. 2005).

Here, the trial court sentenced Nowak to the presumptive term for murder, fifty-five years. Blakely is not implicated by the imposition of a presumptive sentence. A trial court may not impose a sentence *greater* than the presumptive sentence unless the facts supporting the aggravators are found by a jury or admitted by the defendant, the

defendant has a criminal history, or the defendant has waived his right to a jury at sentencing. See Blakely, 124 S. Ct. at 2536-37, 2541. Nowak did not receive an enhanced sentence, and his Blakely argument fails. See, e.g., Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004) (holding that no Blakely issue was presented or addressed because the court revised the defendant's sentence to the presumptive based upon state law grounds); Bell v. State, 820 N.E.2d 1279, 1281 n.1 (Ind. Ct. App. 2005) ("Blakely is not implicated because Defendant received the presumptive sentence for each of the felonies for which he was convicted."), reh'g denied, trans. denied.

Additionally, to the extent Nowak implies that his habitual offender enhancement should have been less than the maximum enhancement of thirty years based upon Blakely, this argument also fails. Unlike typical criminal sentencing provisions that provided a presumptive sentence for the class of offense, the habitual offender enhancement provided the trial court with discretion to sentence a defendant "to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years." Ind. Code § 35-50-2-8(h) (subsequently amended by Pub. L. No. 166-2001, § 3 (eff July 1, 2001); Pub. L. No. 291-2001, § 226 (eff. July 1, 2001); and Pub. L. No. 71-2005, § 11 (eff. April 25, 2005)). Here, the presumptive term for murder was fifty-five years, and thus, the maximum sentence on the habitual offender determination was thirty years. See Ind. Code § 35-50-2-3. Because under the habitual offender statute, the "statutory maximum"

sentence is the maximum sentence the trial court may impose, i.e., three times the presumptive sentence, the habitual offender enhancement does not fall within the sentencing schemes applicable to a Blakely challenge.

For the foregoing reasons, we affirm Nowak's sentence for felony murder and the enhancement due to his status as an habitual offender.

Affirmed.

NAJAM, J. and ROBB, J. concur